PHUANG LEONG HUA

v.

DRAHMAN BUJANG & ANOR

HIGH COURT SABAH & SARAWAK, BINTULU
SULAIMAN DAUD JC
[ORIGINATING SUMMONS NO: 24-23-99 (BTU)]
12 JULY 2000

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Whether service of originating summons proper - Whether order a nullity against deceased first defendant - Whether order could be enforced against 2nd defendant*

CIVIL PROCEDURE: *Action - Application to set aside court order - Rules of the High Court 1980, O. 13 r. 8 - Order made after hearing plaintiff's submission - Whether O. 13 r. 8 only applied to setting aside order in default of appearance - Whether application could still proceed under O. 2 r. 2*

This was an application by the defendants under O. 2 r. 2 and O. 13 r. 8 to set aside an order ('the order') made in the absence of them. The order was made pursuant to an application by the plaintiff for the removal of a caveat lodged by the defendants against a certain piece of land. The grounds for the setting aside application were: (i) that there was no service of the originating summons ('OS'), in respect of which the order was obtained, on the defendants; (ii) that the order was null and void against one of the defendants who had passed away; and (iii) that there was a defence on the merits.

The plaintiff contended: (i) that he had served the OS on the defendant's solicitor; and (ii) that the application made under O. 13 r. 8 was not applicable as the said rule related to the setting aside of an order made in default of appearance whilst in this case the order was made after hearing the submission of the plaintiff.

Held:

[1] The facts showed that at the time of purported service the defendants' solicitors were not appointed to act for the defendants. Thus, the said service was fundamentally irregular with the resulting effect of non-service. It followed that the proceedings arising therefrom was irregular and the order made in respect thereof irregularly obtained.

[2] The defendants could rely on O. 2 r. 1(2) in making the said application. Order 2 r. 1(2) clearly states that in the case of non-compliance with the RHC the court shall have the option either to set aside the subject of the irregularity or to allow an amendment to be made. In the instant case, the irregularity arose from the failure on the part of the plaintiff to serve the OS in the manner prescribed under the RHC which resulted in non-service. The application to set aside the order would succeed on this ground alone.

[3] The order was a nullity in so far as it related to the deceased first defendant and should be set aside on that ground alone. Even if the order was valid against the 2nd defendant, it could still not be enforced and put into effect as the caveat was jointly entered by both the defendants. It could only be removed by an order validly obtained in respect of both the defendants as their interest in the caveat was jointly and not severally.

[4] Whether the defence had a reasonable prospect of success or that there was a defence on the merit should only be considered where the order was regularly obtained and not otherwise as in the instant case.

[Application allowed with costs.]

Case(s) referred to:

Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul [1955] 1 MLJ 457 ***(refd)***

Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd & Ors [1996] 5 MLJ 51 ***(dist)***

Hock Hua Bank Bhd v. Sahari bin Murad [1981] 1 MLJ 143 ***(dist)***

Sunkyong International Inc v. Rubber Development Corp Bhd [1992] 3 CLJ 1531 ***(refd)***

Tuan Haji Ahmed Abdul Rahman v. Arab Malaysia Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2 rr. 1(1), 2, O. 10 rr. 1(1), (2), (4), 5, O. 13 r. 8, O. 35 r. 2, O. 56 r. 1, O. 62 r. 1

For the plaintiff - KY Lin; M/s Kadir Wong, Lin & Co
For the defendants - Lai Chee Hua; M/s Wan Ullok Jugah Chin & Co

Reported by Raja Vishnu

JUDGMENT

Sulaiman Daud JC:

This was an application by way of summon in chambers under O. 2 r. 2 and O. 13 r. 8 of the Rules of the High Court 1980 ("RHC") by the defendants for a prayer that the order dated 13 November 1999 made by this court in respect of Originating Summons No: 24-33-99(BTU) ("the said order") in the absence of the defendants and the defendants' solicitor be set aside and for other consequential relief.

The facts of the case are not in dispute. On 10 July 1999 the plaintiff by way of originating summons made an application to the court for a prayer, among others, that the caveat No. 677/1981 ("the said caveat") lodged by the first and second defendants ("the defendants") against all that parcel of land situated at Sungai Jabai, Bintulu measuring 1.009 acres and described as Lot No. 1447 ("the said land") Kemena Land District to be removed forthwith and that the defendants shall deliver the duplicate title thereof to the plaintiff within fourteen days. The said caveat was entered in 1981, and subsequently in 1982 the defendants commenced proceedings by way of writ ("the 1982 writ") against the registered owner of the said land for a specific performance of an agreement entered between them in respect of the land. Pursuant to the 1982 writ the defendants obtained a court order dated 10 June 1982 extending the validity of the said caveat until the disposal of the 1982 writ. It is also not disputed that the 1982 writ was neither served nor renewed. However in 1989 the plaintiff took out a writ ("the 1989 writ") against the defendants preying, among others, for the removal of the said caveat and the suit is still pending before the High Court at Miri.

After a lapse of almost ten years from the filing of the 1989 writ the plaintiff again in 1999 filed another process against the defendants by way of originating summon for the removal of the said caveat, which removal was also preyed for in the 1989 writ. The said originating summons was not served on any of the defendants but instead it was served on the solicitor appointed by the defendants to act for them in the 1989 writ, that is Messrs W & Co ("Messrs W"). Before the purported service of the originating summons the plaintiff's solicitor by a letter dated 10 June 1999 informed Messrs W that they were in the process of preparing an originating summons for the removal of the said caveat which will be served on them in due course. Pursuant thereto on or about 20 August 1999 the plaintiff's solicitor served a copy of the originating summons on Messrs W with a covering letter in which was stated that "if we do not hear from you within ten days from the date hereof you are deemed to have accepted service of the above-captioned originating summons". Messrs W neither replied nor acknowledged service of the originating summons.

However in a letter dated 7 September 1999 addressed to the plaintiff's solicitor Messrs W requested them to make the necessary application to the court to substitute the first defendant, Drahman bin Bujang, deceased, with the personal representatives of his estate before they can seek instruction from the personal representative to have their retainer to act for their behalf. On 2 November 1999, one day before the day fixed for the hearing of the originating summons, Messrs W by facsimile transmission informed the plaintiff's solicitor that "as for the above suit wherein the subject land is the same, we have not received any instruction from the two defendants to act for their behalf more so when the above 1st defendant Drahman bin Bujang is now a deceased". This was followed by a letter to the learned senior assistant registrar to the same effect. On the day fixed for the hearing of the originating summons counsel for the plaintiff was present but neither the defendants nor their counsel were present. At the request of the plaintiff's counsel the court proceeded to hear the matter and heard submission by the said counsel in the absence of the defendants before making the order in question. The said order was served on Messrs W and the defendants now apply for the same to be set aside.

The defendants' application to set aside the said order are based on three grounds, firstly the said order is an irregular order as there was no service of the originating summons on the defendants, secondly one of the defendants has passed away and the order against him is null and void and thirdly the defendants have defence on the merit. The plaintiff opposed the application on four grounds, firstly that O. 35 r. 2 of the RHC under which the application was made has no application, secondly Messrs W has accepted the service of the originating summons, thirdly the court is *functus officio* and lastly there is no merit in the application. I shall now deal with the grounds upon which the defendants based their application and the objections raised by the plaintiff.

Non-Service Of Originating Summons

The Rules of the High Court 1980 makes specific provisions for the service of originating summons. O. 10 r. 1(1) to O. 10 r. 1(4) make general provisions for the service of writ which are also applicable to the service of originating summons by virtue of O. 10 r. 5. Order 10 r. 1(1) provides that the originating summons must be served personally on each of the defendant or by sending it by prepaid AR registered post addressed to his last known address. Under O. 10 r. 1(2) it is provided that where the defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of the defendant, the writ shall be deemed to have been duly served on that defendant and to have been served on the date on which the endorsement was made. Order 62 r. 1 requires service of originating summons to be effected by way of personal service.

As regard service of the originating summons counsel for the defendants submitted that since it was not served on the defendants personally but was served on Messrs W who was not then appointed as their solicitor in respect thereof, there was a failure on the part of the plaintiff to comply with the mode service as prescribed in the RHC. As such counsel concluded there was a non-service of the originating summons on the defendants. The defendants' counsel further argued that the first defendant, Drahman bin Bujang, has passed away on 27 August 1991 and that they have informed the plaintiff's counsel of the same and requested them to apply for substitution of the party before they can seek instruction from the personal representative to have their retainer to act on their behalf.

Counsel for the plaintiff however argued that in the covering letter enclosing the originating summons it was clearly stated that "if we do not hear from you within ten days from the date hereof, you are deemed to have accepted service of the above captioned originating summons". According to counsel the fact that Messrs W did not return the originating summons within the said ten days period and has taken step by requesting the plaintiff's solicitor to apply for the substitution of parties are clear proof that Messrs W have accepted service on behalf of the defendants.

The main question for determination before me is whether the service of the originating summons by the plaintiff's solicitor to Messrs W in the circumstances and manner aforesaid is good and valid service on the defendants. From the affidavit evidence it is obvious that the defendants have not at the time of service appointed Messrs W to be their solicitor in respect of the originating summons. They were only appointed in relation to the 1989 writ where the prayer sought is substantially similar to that of the originating summons. By virtue of their appointment to act for the 1989 writ and the similarity in the subject matter of the 1989 writ and the said originating summons can it be said that Messrs W has also been appointed or deemed to have been appointed by the defendants for the purpose of the originating summons. My answer to the question is in the negative. It is without doubt that the 1989 writ and the originating summons are two different and distinct processes even though they relate to substantially the same subject matter. It is apparent that the originating summons stands on its own and is not an interlocutory application which arose from the 1989 writ. Since at the time of the purported service Messrs W has not been appointed to act for the defendants I am of the view that said service to them is irregular and does not constitute valid and effective service upon the defendants. As the service of the originating summons is irregular it necessarily follows that the proceedings arising therefrom is irregular and the order made in respect thereof is irregularly obtained.

Setting Aside Of Order On The Ground Of Irregularity

Having concluded that the said order is irregularly obtained the next question to be determined is under which order of the RHC should an application to set aside the said order be made. As apparent from the heading of the instant summons it was taken out under O. 2 r. 2 and O. 35 r. 2 of the RHC. Counsel for the plaintiff pointed out O. 35 r. 2 relates to setting aside of an order obtained at trial and is not applicable to the instant application where the originating summons was heard in chambers. On realising the mistake the defendants' counsel made an oral application to amend the heading to that of O. 13 r. 8. I allowed the application since it is an irregularity which can be rectified without causing injustice to the other party. In *Sunkyong International Inc v. Rubber Development Corp Bhd* [1992] 3 CLJ 1531, the Supreme Court held that an omission, being failure to comply with the rule, was not fatal and curable under O. 2 r. 1(1) and 2 of the RHC without any amendment.

However as correctly pointed out by the plaintiff's counsel reliance on O. 13 r. 8 is still erroneous as the said rule relates to the setting aside of an order made in default of appearance and is also not applicable to the instant case where the order was made after hearing submission of the plaintiff. Further counsel for the plaintiff also contended that it is incumbent upon the applicant to state correctly the particular rule of the RHC upon which the application is made failing which may render the application liable to be struck out. This court was then referred to *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari Abdul* [1955] 1 MLJ 457 where his lordship Gopal Sri Ram, JCA said at p. 477:

> It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out unless sooner amended.

In reply there counsel for the defendants submitted even if reference to O. 13 r. 8 is incorrect he is also relying on O. 2 r. 2 of the RHC as clearly stated in the heading of the instant summons. O. 2 r. 2 provides as follows:

> 2.(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

It is without doubt that the aforesaid provisions expressly provide for the procedure of an application to set aside for irregularity any proceedings or any order obtained in any such proceedings. As the application in the instant case relates to the setting aside of an order irregularly obtained in a proceedings and that it was made within a reasonable time before the plaintiff has taken any fresh step after becoming aware of the irregularity, I therefore unhesitatingly hold that the defendants can rely solely on O. 2 r. 2 in making the said application. The power of the court to set aside an order obtained in proceedings on the ground of irregularity by reason of non-compliance with the RHC can be found in O. 2 r. 1(2) which provides as follows:

> 1.(2) Subject to paragraph (3), the Court may on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealings with the proceedings generally as it thinks fit.

Under the said O. 2 r. 1(2) it is clear that in the case of non-compliance with the RHC the court shall have the option either to set aside the subject of the irregularity or to allow amendment to be made. In the instant case the irregularity arose from the failure on the part of the plaintiff to serve the originating summons in the manner prescribed under the RHC with the resulting effect of non-service. In my opinion it is beyond question that failure to serve the originating summons where service thereof is necessary is not a curable irregularity but a failure which goes to the root of the conception of the proper procedure in litigation as it deprived the person effected thereby from making a defence against the allegations or averment made against him. For the reason stated above I am of the view that the application made by the defendants to set aside the order in question will succeed on this ground alone.

However if I am wrong in so deciding, I am also of the view that the failure to serve the originating summons on the defendants is an irregularity of a fundamental nature which shall have the effect of nullifying the proceedings and the order obtained therein. The procedure for setting aside an order which is a nullity has been authoritatively stated in *Tuan Haji Ahmed Abdul Raman v. Arab Malaysia Finance Bhd* [1996] 1 CLJ 241 where Edgar Joseph Jr FCJ (as his lordship then was) said at p. 247:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to set it aside *ex-debitio justiciae*, that is to say irrespective of the merit and without terms. Having said that the application to set aside the judgment should

a be made within reasonable promptitude, in other words within reasonable time and before the defendant has taken fresh step after knowing of the irregularity.

Having made this finding it may not be necessary for me to further consider the question of *functus officio* and merit and the effect of an order made against a deceased person as respectively raised by defendants and the plaintiff b However for completeness I will briefly deal with them. On the issue of *functus officio* the plaintiff's counsel contended that as the originating summons was heard on the merit and the order obtained has been extracted and perfected it is wrong in law for the defendants to apply for the setting aside of the order but instead the defendants ought to have appeal against c the decision. In support of his argument counsel cited *Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd & Ors* [1996] 5 MLJ 51. With respect I am of the view that the principle laid down in the *Delcont* case is not applicable to the instant application. In that case the issue before the court was whether the order made on appeal under O. 56 r. 1 of the RHC ought to be set aside d or appealed against as distinct from the present application where the order in question was irregularly obtained and not made pursuant to an appeal. Counsel for the plaintiff also referred to *Hock Hua Bank Bhd v. Sahari bin Murad* [1981] 1 MLJ 143 (FC) where it was held that court had no power under any application in the same action to alter vary or set aside a judgment e regularly obtained after it has been drawn up except under the slip rule. I am also of the view the facts of that case can be easily distinguished with the present application as in that case the order was regularly obtained and was made after hearing both the parties in proceedings not tainted with any irregularity.

f The remaining issue which is worth considering is the effect of the said order against the deceased first defendant. I fully agree with the defendants' counsel in contending that the said order is a nullity in so far as it relates to the deceased first defendant and should be set aside on that ground alone. In *Lazard Bros & Co v. Bank Industrille de Moscow* [1933] AC 289 Lord g Wright said at p. 296:

> It is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as judgment debtor was at all material times at the date of the writ and subsequently h non-existence. If the defendant cannot be before the court because in law there is no such person, I think by purity of reasoning the court must refuse to treat the proceedings as other than a nullity.

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I will further add that even assuming the said order is valid as against the second defendant, it still cannot be enforced and put into effect for the removal of the said caveat which was jointly entered by both the defendants. It can only be removed by an order validly obtained in respect of both the defendants as their interest in the caveat is jointly and not severally.

As regard the issue of merit as raised by both the counsels it is sufficient for me to simply say that the question whether the defendants have a reasonable prospect of success or that there is a defence on the merit should only be considered where the order is regularly obtained and not otherwise as in the instant case.

In conclusion I hold that this court has the power to set aside the said order as it was irregularly obtained by reason of failure of service of the originating summons to the defendant. Accordingly I allow the application and set aside the said order with cost to be taxed unless agreed.